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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MEDICAL SOCIETY OF THE STATE OF NEW YORK and NATHANIEL H. SOLOMON,
Petitioners,
v.
THOMAS SOBOL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New York—Appellate Division Third Judicial Department

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE AMERICAN MEDICAL ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Medical Association ("AMA") respectfully moves this Court for permission to file a brief as *amicus curiae* in support of the petition in this case. Pursuant to Supreme Court Rule 37.2, *amicus* sought the written consent of all parties to the filing of this brief. Petitioners have consented but respondents have not. Accordingly, *amicus* must file this motion with the Court.

Amicus respectfully submits that there are compelling reasons to grant this motion. As the statement of interest in the attached proposed brief explains, *amicus* is a national organization representing hundreds of thousands of practicing physicians nationwide. As such, *amicus* is vitally concerned about the constitutionality of state statutes that restrict the ability of physicians to practice medi-

cine. In addition, thousands of the AMA's physician members practice medicine in the state of New York and will be directly affected by the outcome of this case.

Amicus seeks leave to file this brief in order to bring to the Court's attention the importance of the decision below to physicians across the country. As noted in the attached proposed brief, all 50 states and the District of Columbia require physicians to pay a registration fee in order to maintain a valid license for medical practice. The decision of the Appellate Division of the Supreme Court of New York upholding a statute that effects a mass-cancellation of physician registrations for no purpose other than to raise funds is a deeply troubling precedent that will only encourage other states to follow suit.

Amicus also wishes to present its view that the decision below is inconsistent with controlling decisions of this Court and compounds the considerable confusion over the scope of the Contract Clause and the Takings Clause. *Amicus* endorses but will not repeat the arguments set forth in the petition. Instead, *amicus* focuses on the two constitutional questions raised by the decision below, and offers a legal analysis complementary to that of the petition. First, with regard to the Contract Clause, *amicus* seeks to demonstrate that the casual reliance of the appellate division on the pervasive regulation of medical practice is no substitute for the traditional analysis this Court has long employed for determining whether statutory terms, when relied upon by individuals, give rise to a contract. In particular, *amicus* brings to the Court's attention several authorities, including two cases decided by this Court, that are not cited in the petition but are directly relevant to the question of whether a contract was formed and that demonstrate the error of the decision below. See, *e.g.*, *Fisk* v. *Jefferson Police Jury*, 116 U.S. 131 (1885); *Mississippi ex rel. Robertson* v. *Miller*, 276 U.S. 174, 179 (1928).

Second, with regard to the Takings Clause, *amicus* demonstrates that the constitutionality of this statute

should be determined in light of this Court's unanimous decision in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980). Here, as in *Webb's Fabulous Pharmacies*, a state has promulgated overlapping statutes that purportedly serve the identical function—recovering registration fees for a single year. Because the net effect, in this case as in *Webb's*, is to exact a forced contribution to the state's general revenues, the statute here is invalid. The argument with respect to *Webb's* supplements, but does not duplicate, the petition's argument with respect to that decision. *Cf.* Pet. 24.

The brief that *amicus* seeks to file thus serves to place the decision below in national perspective and to draw the Court's attention to additional authorities that bear on the validity of the decision. *Amicus* believes that its brief will assist the Court in its review of the petition. *Amicus* therefore respectfully requests that this Court grant its motion for leave to file a brief as *amicus curiae* in support of the petition.

Respectfully submitted,

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QUESTIONS PRESENTED

Whether a state that offers to permit physicians, upon payment of a registration fee, to practice medicine for three years, but subsequently (after payment is received) cancels the third year of registration and compels re-registration in order to raise additional revenue,

(1) impairs the state's contractual obligation to honor its statutory commitment to register physicians for three years upon receipt of the statutorily prescribed fee, in violation of Article 1, Section 10, clause 1 of the Constitution of the United States; or

(2) effects a "taking" of physicians' property interests in their previously obtained registrations in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The American Medical Association ("AMA") is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1846 to promote the science and the art of medicine and improve the public health. Its approximately 280,000 members—over half of all physicians currently licensed to practice medicine—practice in all fields of medical specialization. Thousands of its members practice medicine in New York, and thus will be directly affected by the outcome of this case.

All states limit the practice of medicine to licensed physicians. Further, all states charge physicians a registration fee in addition to licensure fees. These fees typ-

ically support the state's regulatory oversight of medical practice. The AMA has long supported such regulatory efforts and continues to work with the federal government and state governments in cooperative and complementary efforts to regulate the practice of medicine, to set high standards for physician performance, and to take disciplinary action where appropriate.

Nevertheless, *amicus* has a strong interest in ensuring that state laws governing the licensure of physicians do not unconstitutionally infringe the right of physicians to practice medicine. The decision below is of particular concern to *amicus* because of the ubiquity of licensing and registration requirements and the eternal temptation of governments to raise revenue from any source available. Accordingly, *amicus* wishes to present its views.

STATEMENT

In New York, as in all 50 states and the District of Columbia, a licensed physician must pay a registration fee to the state in order to practice medicine. Beginning in 1983, the New York state legislature adopted a triennial registration schedule under which physicians paid their registrations in full at the outset of each three-year period.[1] Physicians that began or resumed their practices during the last two years of a registration period were entitled to "receive a prorated refund of one-third of the total registration fee for each full year of the triennial period that has elapsed prior to the date of registration."[2]

The most recent triennial period began January 1, 1989. Physicians, such as petitioner Nathaniel H. Solomon, M.D., who paid their three-year registration fee prior to January 1, 1989, received a certificate confirming

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[1] *See* N.Y. Educ. Law §§ 6502, 6524(8) (McKinney 1985 & 1994 Supp.).

[2] N.Y. Educ. Law § 6502(3) (McKinney 1994 Supp.); *see* Pet. App. 37a.

their registration for the three-year period ending December 31, 1991. Pet. App. 26a-27a. In 1990, however, the state legislature abandoned the three-year registration schedule in favor of a two-year schedule. Rather than make the new schedule effective at the conclusion of the existing schedule (*i.e.*, January 1, 1992), the legislature simply cancelled the third year of the registration period. Registered physicians, such as Dr. Solomon, were notified that their registrations were no longer valid for three years, as the state had originally promised they would be. Because the third year of registration was cancelled, any physician who continued to practice into the third year without re-registering and paying a new fee would do so in violation of state law and be subject to loss of license. Pet. App. 27a-28a, 37a-40a; N.Y. Educ. Law §§ 6502(1), 6524(8)-(10) (McKinney 1985 & 1994 Supp.).

The trial court correctly held (Pet. App. 8a-17a) that the New York state legislature's decision to cancel the third year of physicians' registrations violated both the contracts clause (U.S. Const. art. 1, § 10, cl. 1) and the takings clause (U.S. Const. amend. V) of the United States Constitution. The Appellate Division nevertheless reversed. The appellate court found that the registration statute did not give rise to any contractual relationship between the state and physicians but "merely increased the registration fee involved." Pet. App. 5a. The court also rejected the takings argument, finding "no property right in the duration of the registration," a "limited financial impact on the overall practice of medicine," and "only a remote effect upon, or interference with, the ability of doctors to fully utilize their medical licenses." Pet. App. 6a.[3]

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[3] The State of New York Court of Appeals declined to review the decision of the Appellate Division, "upon the grounds that no substantial constitutional question is directly involved." Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

The decision of the Appellate Division is inconsistent with decisions of this Court and adds to the considerable confusion over the constitutional limits to retroactive state legislation. Given the pervasiveness of medical and professional licensure requirements and the persistent demand for new revenue sources, the decision below will surely lead to similar expropriations by other states. Only this Court can provide states with appropriate guidance on the constitutionally permissible boundaries of state legislation in this area. The constitutionality of this state statute, which was ruled invalid by the trial court, should be reviewed by this Court.[4]

I

This Court should review the Appellate Division's holding that New York's licensure and registration statutes do not give rise to a contract between physicians and the state that is protected by the Contract Clause. The point of departure in analyzing any statute challenged under the Contract Clause is the determination whether the statute creates contractual obligations protected from impairment by the United States Constitution. The analysis of the Appellate Division illustrates the need for guidance on this critical question. For the Appellate Division, it was sufficient simply to note that the practice of medicine is "comprehensively and pervasively regulated." Pet. App. 5a. Such an observation, though concededly true, is not sufficient to answer the serious constitutional question raised here. The growth

[4] This case would have qualified for plenary review under the Court's former appellate jurisdiction, because a state court has rejected a federal constitutional attack on the validity of a state statute. *See* 28 U.S.C. § 1257(a) (1988). Even though review of such cases is no longer mandatory, this factor may properly be considered by this Court in exercising its discretion to grant certiorari, particularly where, as here, the trial court invalidated the statute on federal constitutional grounds.

of the administrative state makes it possible today to characterize most professions and trades as a "heavily regulated business." *Id.* Extensive regulation has not, in itself, freed the states from their constitutional duty to respect their contractual obligations.

This Court has long established the basic principle that when a statute sets forth terms that invite individual performance, such performance by an individual gives rise to a contract with the state subject to the protection of the Contract Clause. As the Court stated in *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938), "a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Art. I, § 10."

For example, in *Fisk* v. *Jefferson Police Jury*, 116 U.S. 131 (1885), the plaintiff, a district attorney, sued to recover the full amount of his salary and fees as set by the legislature at the time he performed his duties. The Court held that the publication of a rate of compensation together with performance by plaintiff gave rise to an implied contract: "[A]fter the services have been rendered, under a law . . . which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate." *Id.* at 134. In so holding, the Court emphasized that the Contract Clause extends to such implied contracts:

> The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation

> can no more be impaired by a law of the State than that arising on a promissory note.

Id. Similarly, in *Mississippi ex rel. Robertson* v. *Miller*, 276 U.S. 174 (1928), the court again applied the Contract Clause to invalidate a state statute that retroactively reduced a state employee's compensation following his performance under the terms set forth in a prior statute. The Court reaffirmed that the "constitutional protection" afforded by the Contract Clause "extends to such [implied] contracts just as it does to those specifically expressed." *Id.* at 179.

This Court's interpretation in *Fisk* and *Miller* of what constitutes a contract for constitutional purposes is consistent with and reflects the historical understanding of contract that underpins the common law system that the Framers, in enacting the Contract Clause, sought to protect. See *Crane* v. *Hahlo*, 258 U.S. 142, 146 (1922).[5] Under the common law, it is settled that the publication of an offer to compensate on certain terms in consideration for performance, followed by performance, gives rise to a contract. See, *e.g.*, *Restatement (Second) of Contracts* §§ 30, 33 (1981).

Against this backdrop, the trial court was plainly correct in finding the existence of a contract. The state of

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[5] *See also Williston on Contracts* § 1:1, at 2-3 (4th ed. 1990), and *Restatement (Second) of Contracts* § 1 (1981) (both defining "contract" as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty"). The commentators further note that promises giving rise to a contractual obligation may be expressly stated by the contracting parties or may be implied from the parties' conduct. *Restatement* § 4. Whether the contract is "express or implied," the distinction involves "no difference in legal effect, but lies merely in the mode of manifesting assent." *Id.* Similarly, "[t]he constitution makes no distinction between the one class of contracts and the other. It then embraces, and applies to both." Joseph Story, *Commentaries on the Constitution of the United States* § 697, at 499 (Carolina Academic Press reprint 1987).

New York, through its legislature, has published the terms on which it is willing to permit physicians to practice medicine in that state. In 1988, one of those terms specified that, upon payment of a registration fee, a licensed physician would be permitted to practice for a period of three years. By paying that registration fee, a physician signalled his or her acceptance of that offer. The state's subsequent delivery to the physician of a certificate confirming the three-year registration simply confirmed what the offer and acceptance had already evidenced: the formation of a contract.

Contrary to the Appellate Division's opinion, the state, in its challenged statute, did not merely increase the registration fee. There is no dispute that the state could have simply raised fees for the next registration period, but that is not what the state did. The state instead cancelled the registrations of physicians statewide, registrations that had previously been honored for the full three years of their statutory duration and which the state had plainly committed itself—through its statute—to honor.

At bottom, then, this case is fundamentally analogous to *Fisk* and *Miller*. As in those cases, the state here desired to have individuals provide the citizens of the state with a valuable service. As in those cases, the state here also desired to establish some of the terms on which those services would be provided. In *Fisk* and *Miller*, the state set the rate of compensation. In this case, the state set the terms and cost for engaging in medical practice. Thus here, as in *Fisk* and *Miller*, the state's decision to publish terms and the individuals' acceptance of those terms is sufficient to create a contract under the Contract Clause.

This Court has recognized that "in order that the constitutional mandate [of the Contract Clause] may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and con-

ditions, and whether the State has, by later legislation, impaired its obligation." *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. at 100. The Court should take up that inquiry here. The Appellate Division's casual reliance on the pervasiveness of regulation would, if allowed to stand, render the Contract Clause a dead letter not only in this case but in virtually all. Plenary review by this Court is therefore warranted.[6]

Indeed, the need for this Court's review and heightened scrutiny is particularly acute where, as here, the State has impaired its *own* contractual obligation simply in order to raise funds. Such cases deserve special attention because the "State's self-interest is at stake." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977). As this Court has observed, "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.*; see also *Lynch* v. *United States*, 292 U.S. 571, 580 (1934). Because the courts below have condoned just such a result in this case, and because their decisions set a precedent that every state will be tempted to follow, this Court should grant the petition.

II

This Court also should review the Appellate Division's erroneous judgment that the new registration fees statute is not an unconstitutional taking. The Takings Clause

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[6] The appellate division did not expressly reach the question whether the subsequent legislation substantially impaired the obligation of a contract under the criteria set forth by this Court because it found no contractual obligation. But the appellate court's analysis of comparable issues under the takings clause leaves little doubt of the result it would have reached had it undertaken that inquiry. *See* Part II, *infra*. Accordingly, while the threshold question of the existence of a contract is in itself worthy of review, the Court could also consider the substantial impairment issue as well.

historically has been one of the most difficult areas of constitutional law in which to establish clear lines within which government constitutionally may act. In this case, however, a state court has upheld the legislature's decision to confiscate the third year of physicians' registration fees for no purpose other than a need for "general enhancement of revenues." Pet. App. 16a. Whatever the bounds of permissible state action under the takings clause, this action exceeds those bounds.

The Appellate Division erred initially in concluding that registration to practice medicine is not a property interest protected from arbitrary cancellation by the state. Property interests stem not from the Constitution but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). For example, an individual with "a legitimate claim of entitlement" to a state-granted benefit has a property interest in that benefit. *Id.*

Here, the law of New York clearly creates a property interest for takings purposes. Citing *Roth*, the New York Court of Appeals has confirmed that, under New York law, contributions that pay money to the state under terms set forth by statute have a property interest in those contributions that is violated when the state subsequently changes the use to which they are put. *Alliance of American Insurers* v. *Chu*, 571 N.E.2d 672, 678 (N.Y. 1991).[7]

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[7] In *Alliance of American Insurers*, the court held that the state created a property right when it promised through statute to provide some "return or credit" to the contributors to the state's insurance security fund. *Alliance of American Insurers* v. *Chu*, 571 N.E.2d 672, 678 (N.Y. 1991); *see* Pet. App. 11a. The court reasoned that if the state "failed to make such payments or credits to them, the contributors could have asserted a legitimate 'claim of entitlement' (*Board of Regents* v. *Roth*, 408 U.S. at 577) to the moneys, grounded in the statutory guarantee." 571 N.E.2d at 678. Accordingly, the court of appeals held that the state was forbidden

Under *Roth* and *Chu*, it would seem clear beyond dispute that physicians have "a legitimate claim of entitlement" (*Roth*, 408 U.S. at 577) in the third year of their registration. Registration is one of the prerequisites of the use of a professional license, and it is a benefit for which the physician directly pays the state. Having received the fee and issued the registration certificate, the state may not cancel the registration, confiscate the fees paid, and compel re-registration, simply for fund-raising purposes. *Alliance of American Insurers*, 571 N.E.2d at 678-80.

Physicians also have a property interest grounded in the "rules and understandings" that govern the licensure of professional activities. Because a failure to maintain valid registration is a complete bar to medical practice in New York, the state can no more arbitrarily cancel an otherwise valid registration than it can deny a license. It is well-established that the state's power to regulate medical practice does not permit it arbitrarily to prevent a physician from practicing altogether. *Dent* v. *West Virginia*, 129 U.S. 114, 121 (1889).[8] Even outside the professional context, this Court has specifically recognized that individuals have a property interest in maintaining state-granted licenses. *Bell* v. *Burson*, 402 U.S. 535, 539 (1971). Having paid the statutorily prescribed registration fee and received written confirmation from the state that his or her registration is valid, a physician has a

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to alter retroactively the statutory requirements where the "effect" is to allow the state to use the fund "as a means of raising revenues for the State's general purposes." *Id.* at 680. Here, as in *Alliance of American Insurers* v. *Chu*, the effect of the state's decision to cancel the third year of physicians' registrations and compel re-registration is simply to free up funds for the state's general purposes.

[8] This Court has repeatedly held that the right to engage in a profession is a constitutionally protected property interest. *See Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 102 (1963); *Konigsberg* v. *State Bar*, 353 U.S. 252, 262 (1957); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957).

legitimate claim to that registration and therefore a protected property interest.

The Appellate Division also erred in concluding that the state's confiscation of the third year of registration was not an unconstitutional taking. This Court's unanimous decision in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), should control the outcome here. In *Webb's Fabulous Pharmacies*, the Court struck down a Florida statute that appropriated the interest that accrued on interpleader funds deposited in the registry of a county court. The Court emphasized the fact that, pursuant to another state statute, the court clerk was entitled to and did receive a fee for the clerk's services in receiving and handling the fund. *Id.* at 155-56, 164-65. Because the state had separately provided for compensation for the clerk, the statute appropriating the interest amounted to "a forced contribution to general governmental revenues" that was "not reasonably related to the costs of using the courts." *Id.* at 163.

New York's appropriation of physicians' third year of registration fees fails for the same reason as Florida's appropriation of the interpleader fund in *Webb's Fabulous Pharmacies*. Like Florida, New York already had in place a fund of moneys (the three-year registration fees) to be used for its oversight duties in 1991. Its subsequent statute purports to fund those same oversight duties for the same year. Pet. App. 6a-7a. But the effect is no different than that condemned in *Webb's Fabulous Pharmacies*: the state, by cancelling the third year of registration, confiscating the fees paid for that year, and compelling payment of a new round of fees for the same year, effectively achieved a "forced contribution to general governmental revenues" from physicians. 449 U.S. at 163. Here, as in *Webb's*, this Court should review the decision of the state court upholding such an action and reaffirm that the takings clause "stands as a shield against the arbitrary use of governmental power." *Id.* at 164.

Finally, the Appellate Division's conclusion that the cancellation of registration has only a "limited financial impact on the overall practice of medicine" (Pet. App. 6a) is erroneous and merits review by this Court. It is true that measuring the cost of re-registration against the value of the overall practice of medicine certainly results in a limited impact. But *amicus* submits that the Appellate Division erred in identifying both the numerator and denominator. New York has taken the entirety of physicians' registrations for the year 1991: a sum amounting to several millions of dollars—substantial by any measure. That sum—as well as the right to practice medicine in New York for one full year—vanished upon the enactment of the revised Section 6524. The fact that physicians can recover their registrations by payment of an additional sum (approximately $8 million in the aggregate, see Pet. 26) does not compensate for the taking.

* * * *

States have a legitimate interest in raising funds for governmental purposes. This Court, however, has long been vigilant in ensuring that these fund-raising efforts do not transgress constitutional limits. Here, the state of New York has seized upon one of the most common state-imposed conditions of medical practice—payment of a registration fee—and simply cancelled wholesale the otherwise valid registrations of tens of thousands of physicians, thereby compelling physicians to pay twice for the same benefit. The state's justification, accepted by the courts below, was merely its desire to raise money. In cases involving the Contract Clause as well as the Takings Clause, this Court has expressly ruled such a justification inadequate. The lower courts' cursory review and casual dismissal of these constitutional issues, if let stand by this Court, will strongly encourage other states to follow New York's lead. Accordingly, the decision below is one of national importance that merits this Court's review.

CONCLUSION

For the reasons stated above as well as those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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